ARIZONA SUPREME COURT
Committee on Civil Rules of Procedure in Limited Jurisdiction Courts
Minutes
August 11, 2011

Members present:
Hon. Paul Julien, Chair
Hon. Timothy Dickerson
Hon. Maria Felix
Hon. Gerald Williams
Mary Blanco
Veronika Fabian
David Hameroff
Stanley Hammerman by Jon Hultgren, proxy
Emily Johnston
Nathan Jones
William Klain
George McKay
David Rosenbaum
Anthony Young

Members present by telephone:
Hon. Jill Davis, by Valerie Winters, proxy

Members not present:
Hon. Hugh Hegyi

Guests:
None

Staff:
Mark Meltzer
Julie Graber

1. Call to Order; introductions; approval of meeting minutes. The Chair called the meeting to order at 10:10 a.m. Mr. Hultgren and Ms. Winters, who served proxies, were introduced. The minutes of the meeting on July 20, 2011 were then reviewed.

> **Motion:** A motion was made to approve the July 20, 2011 meeting minutes. The motion was seconded and it carried unanimously. **RCiP.LJC 11-010**

The Chair reminded the members of the timeline for making presentations to various stakeholders regarding the Justice Court Rules of Civil Procedure ("JCRCP") prior to presenting these rules to the Arizona Judicial Council in December. Those stakeholders include standing committees of the Supreme Court, particularly the Committee on Limited Jurisdiction Courts and the Committee on Superior Court; and other organizations such as the Limited Jurisdiction Court Administrators Association and the Arizona Justice of the Peace Association, which both meet next month. Although the State Bar doesn't have a section devoted to justice court practice, the members discussed a presentation to appropriate rules and legal services committees of the Bar. The members also discussed the possibility of statewide forums to gain broad input from the public and justice court practitioners. The Chair suggested that RCiP.LJC schedule a meeting later this year to review comments and suggestions from stakeholders that are provided during these presentations.

2. Review of the most recent draft of the JCRCP.

The members discussed and made changes to the draft document as indicated below.

Rule 141: The Chair suggested that the following "special provision" be added to the rule on summary judgment: "The failure of a party who does not have the burden of proof on a claim or defense to file a response to a motion is not a sufficient basis for granting a summary judgment motion." This "special provision" is distinguished from the general provision in Rule 130(e), the rule on motions, which provides: "The court may treat a party's failure to file a response to a motion as the party's consent that the motion be granted." It was noted that the proposed special provision in Rule 141 codifies case law, for example, *National Bank of Arizona v Thruston* [218 Ariz. 112, 180 P.3d 977 (Div. 1, 2008)], which requires that the moving party "point out" to the trial court, by references to the record, that insufficient evidence exists to support the opposing party's affirmative defenses.

A member suggested a different requirement for the JCRCP: that hearings be set on motions for summary judgment, especially if the court might grant a motion. This would preserve the opportunity for opposing parties to have a "day in court" for cases that might be summarily resolved. A hearing would also afford a self-represented litigant who might not have the skills to provide a well-constructed written response to instead submit an oral response in court. However, the rationale for providing an oral response was criticized as allowing for a response by ambush, with the result that a hearing might then be less rather than more meaningful. A requirement that a hearing be set on a large number of summary judgment motions might also tend to increase court congestion. On this point it was noted that some debt relief agencies have been recommending to self-represented defendants in collection cases that form answers be filed that raise every available defense, including defenses that clearly don't apply in a case; and these form answers may complicate summary judgment proceedings. In addition, several members expressed that trial judges know when a hearing on a motion is appropriate, and the judges should continue to have discretion on when a hearing should be scheduled.

The consensus was that the summary judgment rule should nonetheless contain a provision that would advise self-represented litigants of the opportunity to file a response to the motion, and the responsibility of the self-represented litigant to present evidence in that response. After further discussion, the members agreed to include the following "notice" provision in Rule 141b:

> "A motion for summary judgment shall include at the beginning the following written notice to the opposing party:
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> > *'This motion asks the court to rule against you without holding a trial. You have a right to file a written response to this motion within thirty days from the date this motion was served'."*

In addition, the "special provision" described above was included in draft Rule 141(c), preceded by the words "notwithstanding Rule 130(e)", to highlight the difference between this provision and the corresponding provision in the general rule on motions. [Staff's note: Would "despite" or "regardless of" be more comprehensible than "notwithstanding"?]

Rule 142: Although a detailed rule concerning motions for new trial was incorporated in the current draft, judicial members of the Committee noted that these motions are not frequently filed. Application of the "80/20" rule therefore indicates that motions for new trial should be only briefly mentioned in the JCRCP, and that the specific procedures of Rule 59 should be incorporated by reference. The members further noted that motions to alter or to amend a judgment, which are allowed by a subsection of Rule 59, are filed fairly frequently in justice courts, and those motions should be referenced in the title of the rule. Accordingly, the members agreed to strike the current title and draft of Rule 142, and to replace it with the following:

> Rule 142: New trial; motion to alter or amend judgment.
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> ***a. Grounds and procedure.*** Under certain circumstances a party may request a new trial. The circumstances and procedures for a motion for new trial are detailed in Rule 59 of the Ariz. R. Civ. P.
>
> ***b. Time for filing.*** A motion for new trial shall be filed within 15 days after entry of judgment, except for a motion for new trial filed after service by publication and default, as described in Rule 59(j).
>
> ***c. Motion to alter or amend a judgment***. A motion to alter or amend a judgment shall be made as provided in Rule 59(l) of the Ariz. R. Civ. P.

Rule 143: This rule corresponds to Ariz. R. Civ. P. Rule 60. The members agreed that there was no need to include a provision in the justice court rules for Rule 60(d), entitled "reversed judgment of foreign state." But the sentiment of the Committee was that Rule 60 should otherwise be carefully modeled in the JCRCP, and because of the significance of particular words and phrases in Rule 60, caution should be exercised when attempting to simplify the text of the rule.

> **Action:** The members directed staff to prepare a redline version showing in detail the changes that draft Rule 143 made to Rule 60.

The Committee also discussed a requirement in draft Rule 122(f) that motions requesting modification or vacation of a judgment (including motions under Rule 143) be served on the opposing party in the same manner as if serving a summons and complaint. Rule 122(f) is based on Ariz. R. Civ. P. Rule 5(c)(4). Motions to vacate a judgment are relatively common in justice court, and a question was raised about justice court practices after these motions are filed if service is not promptly made on the opposing party, or if service cannot be completed because the opposing party can't be located. One view was that the court's method of handling these situations should be the subject of judicial training rather than a rule requirement. A different view was that a rule should have directions on how to proceed in these situations, including the number of days a moving party should have to complete service before the court deems the motion to be moot for lack of service. A suggestion was made that a rule should provide that the

moving party have a specified period of time, either 60 or 120 days, in which to complete service. This time period would permit the moving party to effect service by publication if that is necessary.

Action: Staff will incorporate language in the next version of the draft rules to further address the matter of service of post-judgment motions.

Rule 139: At this point a member raised an issue that Rule 139, which concerns judgment, contains too many time frames. Specifically, the draft rule allows or requires that a form of judgment, a statement of costs, and a request for attorneys' fees be submitted to the court at different times rather than simultaneously. While this may be an appropriate procedure in superior court, the better practice in justice court would be for the forms to be submitted concurrently. Also, the rule should require a party to submit self-addressed envelopes with the proposed judgment. Mention was also made that in many courts self-represented litigants as well as attorneys prepare the forms of judgment, although this is not a uniform practice statewide.

Action: Staff will revise the text of draft Rule 139 consistent with this discussion.

Rule 143(d): The members shared the view that the rule on harmless error should not be included in draft Rule 143(d). It should either be a freestanding rule, as it is in the Ariz. R Civ. P., or it should be located elsewhere in the JCRCP.

Action: Staff will follow up on the location of the harmless error rule.

Rule 145: Revisions to paragraphs (b), (c), and (d) were reviewed. Paragraph (b) was revised to conform to revisions that had been previously made to paragraph 119(e). Revisions to paragraph (c) provided that a lawsuit could be voluntarily dismissed without a court order upon the filing of a written agreement signed by the parties who have appeared in the lawsuit, and a claim could be dismissed upon the filing of a written agreement signed by the parties to the claim. The word "voluntary" was deleted as the first word in the title of paragraph (d), so that the title now states: "Dismissal in other circumstances."

The proposed language in paragraph (f) regarding dismissal for failure to conclude a lawsuit within ten months had initially been suggested by Judge Hegyi, but on further review the Committee believed that the language required revision. The proposed language would permit the court to dismiss a lawsuit even if the plaintiff was completely without fault; the members believed that a dismissal should occur only under circumstances where the plaintiff was responsible for prolonged inactivity in a case.

The members discussed scenarios where there may be inactivity, such as

- There is no affidavit of service in the file;
- There is an affidavit of service but no answer on file;

- Plaintiff filed an application for entry of default, but not a motion for default judgment;
- The parties have reached a settlement, but plaintiff is awaiting payment before dismissal.

In these situations, the court needs to prompt the plaintiff to take action prior to the court's dismissal of the case.

During the discussion of this rule, some members expressed a belief that a trial date is typically set at a pretrial conference, which would be scheduled upon the filing of an answer; and every case where the defendant has made a written appearance would promptly have a pending trial date and would not therefore be subject to dismissal. However, some precincts place the burden of requesting a trial date on the parties; a pretrial conference date is not set automatically upon the filing of an answer in those courts. In addition, some precincts set a case for mediation prior to or following a pretrial conference, and this may lessen the need to automatically set a trial date.

The proposed drafts for dismissal of a case for failure to prosecute that were provided by Judge Hegyi, and an alternative provided by Ms. Blanco, were the subject of other comments. One of the drafts contained an unnecessary limit of one extension, and neither draft provided a standard for obtaining an extension. Also, neither embodied the concept that a dismissal should occur only if the plaintiff was responsible for inaction in the case.

A proposal was made that the 120 day abatement period of the summons should be deleted from the rules, and that the plaintiff should simply have ten months to notify the court that the case is ready for trial. Views opposing this proposal expressed that the 120 day rule for service is ingrained in practice, and that public policy supports prompt service of a summons. Extending the time for service beyond 120 days might slow case processing. A suggestion was made that if ten months was too long, that the proposal could instead provide that plaintiff would have six months to accomplish service and set a case for trial. The idea underlying this suggestion was that the deadline for service would be the same as the date for dismissal. A motion to reject this suggestion was then made, seconded, and discussed:

> **Motion:** To retain the 120 day rule for service of the summons, with the condition that plaintiff may file a motion to extend the time in which to serve the summons for good cause; and to have a separate and distinct deadline for dismissal because of failure to prosecute a lawsuit. The motion passed: 9-4-1. **RCiP.LJC 11-011**
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> **Action:** Judge Hegyi and Ms. Blanco will confer concerning revisions to the language concerning dismissal for failure to prosecute a lawsuit.

While on the subject of time, Ms. Fabian introduced a proposed table that would contain relevant time limits under the JCRCP. A member noted that a trend exists in federal practice to do time calculations in calendar days rather than court days, and a suggestion was made that to simplify use of this table by self-represented litigants, it should be expressed in calendar rather than court days. One member of RCiP.LJC who served on an Arizona committee that considered this issue

advised that the use of calendar days would require consideration of deadlines contained in statutes; there are a large number of existing statutes that could potentially have an effect on time calculations, and that committee therefore concluded that it would retain the existing method of using court days. Another member suggested the use of two time tables in the JCRCP, one based on calendar days, the other based on court days. This issue may require further discussion.

3. Next steps. Because the members have not concluded a comprehensive review of the JCRCP, the Chair suggested that another meeting be scheduled for September. The members then agreed to reconvene on Wednesday, September 28, 2011. September 28 follows the initial presentation dates of the JCRCP to the LJC, LJCAA, and COSC. Accordingly, the draft JCRCP will be presented at those meetings as a "work in progress" rather than as a final product. In addition, comments received at these presentations will be considered by RCiP.LJC at the September 28 meeting.

4. Call to the Public; Adjourn. There was no response to a call to the public. The meeting was adjourned at 2:45 p.m.

The next meeting date is **Wednesday, September 28, 2011.**

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